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Supreme Court of the United States

OCTOBER TERM, 1963.

No. 290

STEWART OIL COMPANY, A CORPORATION; MICHIGAN OIL COMPANY, A CORPORATION; STEWART PRODUCERS, INC., A CORPORATION; KENNETH PATTERSON; G. F. STEWART; W. ROLLAND STEWART; FRANK J. TIERNAN AND MORRIS YARBROVE,
Plaintiffs-Respondents,

vs.

SOHIO PETROLEUM COMPANY,
Defendant and Counter Claimant,

vs.

WALTER E. KLINE; STELLA P. KLINE; R. E. HAYES; W. T. FREDERKING AND A. P. WAGEMANN,
Counter Defendants-Petitioners,

and

CARL E. MOSES; DAVID R. STEWART AND DONK BROS. COAL & COKE COMPANY,
Counter Defendants-Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	2
Jurisdiction for Review	2
Questions Presented	2
Grounds in Objection to Review:	
I. The Petition Should Not Be Entertained	4
II. The District Court Had Jurisdiction	5
III. The Deed Construction is Governed by Illinois Law and Has Been in Accordance Therewith	7
IV. The Findings of Fact Are Supported and Further Review Is Unwarranted	9
Appendix "A"—Statutes and Court Rules Involved	11

CITATIONS.

Adkins v. Adams, 7 Cir., 152 F. 2d 489, 492 (1945)	8
Bierman v. Marcus, 3rd Cir., 246 F. 2d 200, 205, cert. denied 336 U. S. 93 (1957)	6
Carpenter v. Strange, 141 U. S. 87, 105, 106, 11 S. Ct. 960, 966, 35 L. Ed. 640, 647 (1891)	6
Eichel v. U. S. F. & G. Co., 245 U. S. 102, 104, 62 L. Ed. 177, 177-178 (1917)	5
Fall v. Eastin, 215 U. S. 1, 8, 30 S. Ct. 3, 6, 54 L. Ed. 65, 69 et seq. (1909)	6
Glenn Falls Indemnity Co. v. U. S., 9th Cir., 229 F. 2d 370, 373-378 (1955)	5
Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275, 278, 88 L. Ed. 721, 724 S. Ct. (1944)	9

Gordon v. Gordon, 1955, 6 Ill. 2d 572, 576-577 6

Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U. S. 271, 275, 93 L. Ed. 676 9

Hardy v. Greathouse, 406 Ill. 365, 373, 94 N. E. 2d 134, 138 (1950) 9

Holcomb v. Aetna Life Insurance Company, 10th Cir., 255 F. 2d 577, 582 (1958), cert. denied 358 U. S. 879 6

Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241, 245, 47 N. E. 2d 96, 98 (1943) 8

Keen v. Cleveland, C. C. & St. L. Ry. Co., 392 Ill. 362, 371, 64 N. E. 2d 499, 503 (1945) 8

McAllister v. United States, 348 U. S. 19, 20, 99 L. Ed. 20, 24, 75 S. Ct. 6 (1954) 9

Metropolitan Life Ins. Co. v. Mason, 3rd Cir., 98 F. 2d 668, 669 (1938) 6

Muller v. Dows, 94 U. S. 444, 449, 24 L. Ed. 207, 209 (1876) 6

Nance v. Donk Bros. Coal & Coke Co., 13 Ill. 2d 399, 407-410, 151 N. E. 2d 97, 101-103 (1958) 8

New York Life Ins. Co. v. Welch, C. A. D. C., 1961, 297 F. 2d 787, 790 6

Roberts v. Dazey, 284 Ill. 241, 244, 119 N. E. 910, 911 (1918) 8

Shell Oil Co. v. Dye, 7 Cir., 135 F. 2d 365, 368-369 (1943) 8

Shell Oil Co. v. Moore, 382 Ill. 556, 565, 48 N. E. 2d 400, 405 (1943) 8

Tope et al. v. Tope et al., 370 Ill. 187, 191, 18 N. E. 2d 229, 231 (1938) 9

U. S. v. Acord, 10th Cir., 209 F. 709, 712 (1954) 5

U. S. v. Sentinel Fire Ins. Co., 5th Cir., 178 F. 2d 217, 224-225 (1949) 6

Walter v. Sohio Petroleum Co., 402 Ill. 33, 41, 83 N. E. 2d 346, 349 (1948) 8

Wilson v. Wilson, 268 Ill. 270, 273, 109 N. E. 36, 37 (1915) 8

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Respondents, Stewart Oil Company, a Corporation; Michigan Oil Company, a Corporation; Stewart Producers, Inc., a Corporation; Kenneth Patterson, G. F. Stewart,

W. Rolland Stewart, Frank J. Tiernan, Morris Yarbrove, Carl E. Moses, David R. Stewart and Donk Bros. Coal & Coke Company, hereby answer and oppose the Petition for Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on April 10, 1963, in the above entitled cause.

OPINIONS BELOW.

The Court of Appeals Opinion here involved is reported in 315 F. 2d 759. As Petitioners state, the District Court opinions appear in 185 F. Supp. 765 and 202 F. Supp. 952.

JURISDICTION FOR REVIEW.

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on April 10, 1963. (See Appendix D, page 27a, attached to the petition filed herein), and not on April 15, 1963 as Petitioners state on page 2 of their petition. No petition for rehearing was filed. No extension of time was applied for or granted within which to file Petition for Writ of Certiorari. The petition for Writ of Certiorari was filed herein on July 19, 1963.

Jurisdiction is not properly invoked, as petitioners state, under Supreme Court Rule 38-5 (b) as there is no rule so numbered.

QUESTIONS PRESENTED.

1. Should this Court entertain a Petition for Certiorari filed more than 90 days after the entry of the judgment of the Court of Appeals contrary to 28 USC sec. 2101 (c) and Supreme Court Rule 22(3)—there having been no extension, within the 90 days, as permitted by Supreme Court Rule 34 (2)?

2. Was the District Court without jurisdiction?

3. Has the deed been construed properly under Illinois Law?

4. Are the findings of fact upon which the District Court denied reformation, which findings were sustained by the Court of Appeals, clearly erroneous?

STATUTES AND COURT RULES INVOLVED

28 U. S. C. sec. 1332 (Appendix "A" herein 12).

28 U. S. C. sec. 1335 (Appendix "A" herein 12).

28 U. S. C. sec. 2101 (Appendix "A" herein 11).

28 U. S. C. Rules of Civil Procedure, Rule 13 (Appendix "A" herein 13).

28 U. S. C. Supreme Court Rules, Rule 19 (Appendix "A" herein 12).

28 U. S. C. Supreme Court Rules, Rule 22 (Appendix "A" herein 11).

28 U. S. C. Supreme Court Rules, Rule 34 (Appendix "A" herein 11).

Illinois Revised Statutes, 1961, Ch. 110, sec. 7 and 8 (Appendix "A" herein 13).

GROUNDS IN OBJECTION TO REVIEW.

I.

The Petition Should Not Be Entertained.

This Court ought not entertain the petition filed herein 100 days after the entry of the Court of Appeals judgment. The filing of the certified transcript of the record on June 21, 1963 did not comply with Rule 22 (3) which requires both the transcript and petition to be filed within the prescribed time of 90 days. 28 U. S. C. 2101, (c). The fact that the transcript of record was filed well in advance of the time limitation demonstrates that the delay was not caused by the petitioners' inability to obtain the record.

The delay in filing the petition is wholly unexplained, and petitioners, aware that the time limitation was expiring, did not, within the time limitation, apply for an extension of time as permitted by Rules 22 (4) and 34 (2). Perhaps because they knew that such applications are not favored, they chose to flout the rule, and file the petition after the time limitation had expired. Had petitioners, at the time they filed their petition, filed an application for an extension of time to file their petition, the Clerk of this Court would have refused the same under Rule 34 (2). While the Court's rules do not authorize the clerk to refuse to receive a petition presented after the time limitation has expired, the mandate of the rules is certain that the petition must be filed within the time limitation. The course taken by petitioners here circumvents the rules and should not be tolerated.

II.

The District Court Had Jurisdiction.

Federal jurisdiction stems from the initial action by Plaintiffs, all Michigan residents, to recover payment for "working interest oil" which they had discovered, severed from the land, possessed as personal property and marketed to the Defendant, Sohio Petroleum Company, an Ohio Corporation, who had so accepted the oil but failed to pay for it.

No other person, firm or corporation was a necessary party to this action and Plaintiffs did not contemplate any quiet title proceedings or deem them necessary in view of the Illinois Law with respect to oil and gas ownership through a "coal and other mineral" conveyance. Sohio Petroleum Company filed its counterclaim and "brought in" the additional parties pursuant to Rule 13(h) of the Rules of Federal Practice and Procedure which so authorizes and specifically provides that "their joinder will not deprive the court of jurisdiction of the action."

When a district court has jurisdiction of the principal action, it also has cognizance of any ancillary proceeding therein, regardless of citizenship of the parties, the amount in controversy or any other factor that would ordinarily determine jurisdiction. *Eichel* v. *U. S. F. & G. Co.*, 245 U. S. 102, 104; 62 L. ed. 177, 177-178 (1917); *United States* v. *Acord*, 10th Cir. 209 F. 2d 709, 712 (1954); *Glenn Falls Indemnity Co.* v. *U. S.*, 9th Cir. 229 F. 2d 370, 373-378 (1955).

Petitioners argue that the Federal Interpleader Statute (sec. 1335, Title 28 U. S. C.) does not provide jurisdiction support for the Sohio Petroleum Company Counterclaim. This statute merits and receives liberal construction. It is designed not only to protect stakeholders from

double or multiple liability but, also, to protect them from trouble and expense of double or multiple litigation. *New York Life Ins. Co.* v. *Welch*, C. A. D. C., 1961, 297 F. 2d 787, 790; *Metropolitan Life Ins. Co.* v. *Mason*, 3rd Cir. 98 F. 2d 668, 669 (1938); *U. S.* v. *Sentinel Fire Insurance Co.*, 5th Cir., 178 F. 2d 217, 225 (1949); *Bierman* v. *Marcus*, 3rd Cir. 246 F. 2d 200, 205 (1957), cert. denied 336 U. S. 93. "Two or more" of the "adverse claimants" were of diverse citizenship "as defined in sec. 1332 of this title". *28 U. S. C., Section 1335.* Surely, a stakeholder is not deprived of the statutory protection through the existence of additional claimants with common state citizenship. *Holcomb* v. *Aetna Life Ins. Co.*, C. A. Oklahoma, 1958, 255 F. 2d 577, 582, cert. denied 358 U. S. 879.

Furthermore, Sohio Petroleum Company, is an Ohio Corporation, whereas the remaining parties are citizens of other states. Consequently, the counterclaim is independently maintainable (as an equitable interpleader action) under the general diversity statute. *Brisacher* v. *Tracy-Collins Trust Co.* 227 F. 2d 519, 525 (C. A. 10, 1960); *John Hancock Mutual Life Insurance Co.* v. *Kraft et al.*, 200 F. 2d 952, 953 (C. A. 2, 1953).

Petitioners' concern over the land situs is of no consequence. The District Court possessed jurisdiction of all parties having or claiming any right, title or interest. It has been long recognized that in these situations a Federal Court may effectively settle title disputes with respect to lands situate outside its territorial jurisdiction. *Miller* v. *Dows*, 94 U. S. 444, 449; 24 L. ed. 207, 209 (1876); *Carpenter* v. *Strange*, 141 U. S. 87, 105, 106; 11 S. Ct. 960, 966, 35 L. ed. 640, 647 (1891); *Fall* v. *Eastin*, 215 U. S. 1, 8; 30 S. Ct. 3, 6; 54 L. ed. 65, 69 *et seq.* (1909). Illinois courts are likewise empowered. *Gordon* v. *Gordon*, 1955, 6 Ill. 2d 572, 576-577.

Furthermore, the Illinois Rule that real estate quiet title

actions are to be brought in the County where the property or some part of it is situated is only a matter of venue and not a jurisdictional limitation. This is evident from a reading of Sections 7 and 8 (the applicable provisions) of the Illinois Civil Practice Act wherein it is also provided that no such action is void because of improper venue and that "all objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by him on or before the date upon which he is required to appear or within any further time that may be granted him to answer or move with respect to the complaint." An action for settlement of Bond County land title disputes could be effectively maintained in St. Clair County or any other Illinois County subject, only, to a venue transfer pursuant to timely motion as provided by the Civil Practice Act. Consequently, federal jurisdiction is also sustained by application of the principle that the law of the forum determines whether an action is transitory or strictly local.

The District Court jurisdiction is sustainable: (a) As ancillary to the initial action; (b) Under the federal interpleader statute; (c) Under the general diversity statute; (d) By the Illinois Law with respect to venue; and (e) Capacity to fully and effectively settle the controversy through exercise of its jurisdiction over all parties having or claiming any right, title or interest in the subject matter.

III.

The Deed Construction Is Governed by Illinois Law and Has Been in Accordance Therewith.

The decision of the Court of Appeals affirming the District Court's action in construing the deed in question to convey oil and gas is in strict conformity with the law of Illinois.

Under Illinois Law, a conveyance of "all coal and other mineral" has a settled meaning and includes oil and gas. *Shell Oil Co.* v. *Dye*, 7 Cir., 135 F. 2d 365, 368, 369 (1943); *Shell Oil Co.* v. *Moore*, 382 Ill. 556, 565, 48 N. E. 2d 400, 405 (1943); *Jilek* v. *C. W. & F. Coal Co.* 382 Ill. 241, 245, 47 N. E. 2d 96, 98 (1943); *Walter* v. *Sohio Petroleum Co.*, 402 Ill. 33, 41, 83 N. E. 2d 346, 349 (1948); *Adkins* v. *Adams*, 7 Cir., 152 F. 2d 489, 492 (1945).

The Illinois Supreme Court has held that a "coal and other mineral" deed identical in language and content with the one here involved, except as to parties grantor and land description, is unambiguous and conveys oil and gas as a matter of law. *Kate B. Nance et al.* v. *Donk Bros. Coal and Coke Co.* 13 Ill. 2d 399, 407-410; 151 N. E. 2d 97, 101-103 (1958).

Where there is no ambiguity in the terms used in a deed or where the language of a deed has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties and extrinsic evidence is not admissible to aid in its construction. *Wilson* v *Wilson*, 268 Ill. 270, 273; 109 N. E. 36, 37 (1915); *Keen* v. *Cleveland C. C. & St. L. Ry. Co.* 392 Ill. 362, 371; 64 N. E. 2d 499, 503 (1945); and *Roberts* v. *Dazey*, 284 Ill. 241, 244, 119 N. E. 910, 911 (1918).

It is evident from the petition filed herein, that petitioners disagree with the local law of Illinois as interpreted by its courts. It cannot be seriously urged that the Court of Appeals has rendered a decision in conflict with applicable local decisions.

Petitioners' disagreement with these decisions cannot change the Illinois Law or its application herein. They were without any legal title to the oil or its proceeds and could only recover through a reformation of the deed. They failed to prove any right of reformation. The evidence and District Court's findings refute the allegation

that the parties to the "coal and other mineral" conveyance did not intend to include the oil and gas. Consequently, even though the instrument were taken as ambiguous, and subject to construction through the aid of extrinsic evidence, the ambiguity would have been and necessarily be resolved *against* the Petitioners.

IV.

The Findings of Fact Are Supported and Further Review Is Unwarranted.

Petitioners sought reformation of the deed made on September 21, 1907 because of mutual mistake of the grantor and grantee, or because of the fraud of the grantor and mistake of the grantee. In such a case Illinois law requires the proof to be strong and convincing. *Hardy v. Greathouse*, 406 Ill. 365, 373, 94 N. E. 2d 134, 138 (1950). A mere preponderance of the evidence is not sufficient. *Tope et al. v. Tope et al.*, 370 Ill. 187, 191, 18 N. E. 2d 209, 231 (1938).

The District Court found the evidence offered insufficient to warrant reformation, and the Court of Appeals affirmed the findings. When the Court of Appeals has accepted the District Court's findings, there must be a strong case to justify this Court in setting aside such findings. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U. S. 275, 278, 88 L. ed. 721, 724 S. Ct. (1944). *Graver Tank & Manufacturing Co. v. Linde Air Products Company*, 336 U. S. 271, 275, 93 L. ed. 676 St. Ct. This court stands in the same position as the Court of Appeals in reviewing the findings of the District Court. *McAllister v. United States*, 348 U. S. 19, 20, 99 L. ed. 20, 24, 75 S. Ct. 6 (1954). The findings are clearly erroneous *only* when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.

In this case, because of the lapse of time, the evidence in support of, and in opposition to, the asserted right to reform an instrument more than fifty years old was at best sketchy. There was no direct evidence to prove what transpired between the parties at the time the deed in question was executed and delivered. (Appellants' Appendix in Court of Appeals, p. 109.) The evidence offered by all parties was principally collateral evidence pertaining to collateral transactions from which conflicting inferences might be drawn.

No useful purpose will be served in again reviewing the mass of exhibits and testimony to judge the validity of the inferences drawn and conclusions reached by the District Court.

CONCLUSION.

The petition has been filed after the "time prescribed by law" (28 U. S. C. 2101, (c), and Rule 22), and ignores the guide lines "governing review on certiorari" prescribed by Rule 19. It is simply a reargument of matters fully presented to and duly considered by the Courts below. There is no basis for further review.

Respectfully submitted,

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APPENDIX "A".

STATUTES AND COURT RULES INVOLVED.

28 U. S. C. Sec. 2101, in pertinent part:

"'(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U. S. C. Supreme Court Rules, Rule 22 in pertinent part:

"Review on certiorari—time for petitioning.

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case * * *

"2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case * * *.

"3. A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within the time prescribed by law."

"4. Application for extension of time within which to file a petition for writ of certiorari * * * must set forth with specificity the reasons why the granting of an extension of time is deemed justified. * * * Such applications are not favored."

28 U. S. C. Supreme Court Rules, Rule 34, paragraph 2:

"Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such

extension shall be timely if it is presented to the clerk within the period sought to be extended. The clerk will refuse to receive any application for extension sought to be presented after expiration of such period."

28 U. S. C. Supreme Court Rules, Rule 19 in pertinent part:

"Considerations governing review on certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

28 U. S. C. Sec. 1332, in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) * * * * *

(3) * * * * *"

28 U. S. C. Sec. 1335, in pertinent part:

"(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association or society having in his or its custody or possession money or property of the value of $500.00 or more, * * * if

"(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property * * * and if (2) the plaintiff has deposited such money or property * * * into the registry of the court * * *

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

28 U. S. C. Rules of Civil Procedure, Rule 13 in pertinent part:

"(h) Additional Parties May Be Brought In. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action".

Illinois Revised Statutes, 1961, Bar Association Edition, Ch. 110, in pertinent part:

"Article II. Venue.

"5. * * *

"6. * * *

"7. Venue—Public corporations—Local actions—Libel—Insurance companies. * * * (1) * * * (2) Any action to quiet title to real estate, or to partition or recover possession thereof or to foreclose a mortgage

or other lien thereon, must be brought in the county in which the real estate or some part of it is situated"

• • • • •

"8. Wrong court or venue—Waiver—Motion to transfer. (1) No order, judgment or decree is void because rendered in the wrong venue, except in case of judgment by confession as provided in section 50(4) of this Act. No action shall abate or be dismissed because commenced in the wrong venue or court if there is a proper venue or court of competent jurisdiction to which the cause may be transferred.

"(2) All objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by him on or before the date upon which he is required to appear or within any further time that may be granted him to answer or move with respect to the complaint" • • •.